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No. 89-453

In the Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT RAINBOW BROADCASTING COMPANY IN OPPOSITION

MARGOT POLIVY
Counsel of Record
KATRINA RENOUF
Counsel
RENOUF & POLIVY
1532 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 265-1807

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Commission's congressionally mandated consideration of broadcast applicants' minority status as one enhancing factor in comparative licensing proceedings is consistent with the equal protection component of the Fifth Amendment?

COUNTERSTATEMENT OF THE CASE

This proceeding involves the comparative qualifications of the petitioner, Metro Broadcasting, Inc. and respondent Rainbow Broadcasting Company to be the licensee of a UHF television station allocated by the Commission to Orlando, Florida in 1982, *Amendment of § 73.606(b), Table of Assignments*, 50 Rad. Reg.2d (P&F) 1714 (1982).[1] Under the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965) (hereafter *Policy Statement*), such comparisons seek to attain two general policy objectives: "the best practicable service to the public" and "maximum diffusion of control of the media of mass communications" ("diversification"). These separate objectives are united by their common service to the overarching First Amendment derived public interest principle that the broadcast audience is best served by "'the widest possible dissemination of information from diverse and antagonistic sources.'" *Id.*, at 394 n.4 (quoting from *Associated Press v. United States*, 326 U.S. 1, 20 (1945)); see *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978).

The diversification criterion "serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *F.C.C. v. National Citizens Committee for Broadcasting, supra*, at 780. It "constitutes a primary objective in the licensing scheme", *Policy Statement, supra*, 1 F.C.C.2d at 394, and "an applicant having no... media interests will all but certainly prevail over a party with such media interests", *Newton Television Ltd.*, 3 F.C.C. Rcd. 553 (Rev. Bd. 1988), *modified on other grounds*, 4 F.C.C. Rcd. 2561 (1989).

The best practicable service criterion involves several factors. Only one, participation of owners in day to day station management ("integration"), *Policy Statement, supra*, 1 F.C.C.2d 393, 395-96, differentiates these two applicants.[2] The integration criterion requires a two part assessment of competing proposals: "quantitative" and "qualitative". The quantitative assessment compares the percentage of the applicants' ownership represented in active day to day station management and a "clear" superiority on this factor is dispositive without more. *See, e.g., WHW Enterprises, Inc.*, 89 F.C.C.2d 799, 819 (Rev. Bd. 1982), *review denied*, FCC 83-368 (Sept. 15, 1983), *affirmed in part and reversed in part on other grounds*, 753 F.2d 1132 (D.C. Cir. 1985). In the absence of such a dispositive quantitative distinction, qualitative factors enhancing the quantitative integration proposals become the tie breaker.

[1] The case originally involved a third applicant, Winter Park Broadcasting, Inc., which sought a dispositive preference for its proposal to provide a first local service to the contiguous suburb of Winter Park. That applicant, which ranked third comparatively (Pet. App. 86a-87a), was effectively excluded by affirmance (Pet. App. 6a-10a) of the Commission's judgment that all parts of an urbanized area are one community for television licensing purposes.

[2] Other components of the best practicable service criterion include proposed program service, where there are "material and substantial differences" between proposals, *Policy Statement, supra*, 1 F.C.C.2d 393, 397-98; an unusually good or bad past broadcast record, *id.*, at 399; efficient use of frequency from an engineering standpoint, *id.*, at 398-99; and facts establishing relevant defects in applicant character, *id.*, at 399, a matter now separately considered and only when potentially disqualifying, *Policy Statement Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179 (1986).

Neither applicant in this case has any other media holding (Pet. App. 80a); neither past nor proposed programing is in issue; the engineering proposals are substantially the same (Pet. App. 81a); and while the Administrative Law Judge disqualified Rainbow for lack of candour in a prehearing filing, he was reversed by the Review Board (Pet. App. 66a-76a) and the matter was not appealed.

The *Policy Statement, supra*, 1 F.C.C.2d 393, 395-96, identified three such factors: local residence, past or prospective; local civic activities; and broadcast experience. It also noted that this listing did not "preclude the full examination of any relevant and substantial factor", *id.*, at 399, and anticipated changes both in emphasis and in policy when future circumstances dictated, *id.*, at 393. Addition of the minority enhancement here in issue was one such change. *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978) (hereafter "*Minority Policy Statement*"). The enhancement, upheld against equal protection challenge in *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601, 613-16 (D.C. Cir.), *cert. denied*, 419 U.S. 986 (1984), was adopted in response to congressional, judicial and agency concern with encouragement of minority broadcast ownership. *Id.*, at 607 (and citations therein). It has been a factor for over a decade in all relevant cases not determined by diversification or quantitative integration differences alone. A similar enhancement for female ownership and participation was subsequently adopted. *Mid-Florida Television Corp.*, 69 F.C.C.2d 607, 652 (Rev. Bd. 1978), *set aside on other grounds*, 87 F.C.C.2d 203 (1981).

In this case, the Review Board found that Rainbow's quantitative integration advantage was "probably a 'clear' enough difference" to be outcome determinative (Pet. App. 87a). It nonetheless also compared the applicants' qualitative attributes. Rainbow was again preferred, on the basis of greater "minority participation", "more significant" past broadcast experience "attach[ing] to larger ownership", and a "very slight" advantage in female participation, advantages found to outweigh Metro's stronger showings on local residence and civic activities. (Pet. App. 87a-88a).

The Commission, "agree[ing] with the Board's resolution of this case" (Pet. App. 61a), denied review (Pet.

App. 60a-63a), noting that the result would be unchanged by deletion of Rainbow's female enhancement (Pet. App. 61a). The case was appealed and briefed on substantial evidence grounds. Prior to argument, however, the Commission successfully sought remand (Pet. App. 58a-59a); issued a *Notice of Inquiry on Racial, Ethnic or Gender Classifications*, 1 F.C.C. Rcd. 1315 (1986)(MM Docket No. 86-484); and ordered the case held in abeyance pending the outcome of that proceeding (Pet. App. 52a-57a). The Inquiry was cut short by House Joint Resolution 395, Continuing Appropriations Act for Fiscal Year 1988 and for Other Purposes, Public Law No. 100-202, 101 Stat. 1329 (1987) (hereafter "Continuing Resolution"), which in pertinent part provided:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a re-examination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended, 52 R.R.2d [1301] (1982) and *Mid-Florida Television Corp.*, [69] F.C.C.2d 607 Rev. Bd. (1978) which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry....

In compliance with the legislative mandate, the Commission reactivated this proceeding and reaffirmed its order upholding the Review Board's grant of Rainbow's application. (Pet. App. 48a-51a). The case was rebriefed, this time including Metro's equal protection challenge to the minority and female enhancements. The court specif-

ically declined to rule on the propriety of the female enhancement, given the Commission's ruling that it did not affect the outcome of the case. (Pet. App. 10a n.5). The minority enhancement, however, was considered and upheld. (Pet. App. 10a-15a). The court reasoned that its earlier decision in *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601 (D.C. Cir.), *cert. denied*, 419 U.S. 986 (1984), "disposed of the constitutional challenges to the use of enhancements for minority ownership, and we are bound to follow this law of the circuit" (Pet. App. 15a), since none of the "several challenges to race and gender preferences in employment" decided by this Court since the circuit court's opinion in *West Michigan* "has undermined the holding" in that case (Pet. App. 11a-12a).

ARGUMENT

The petition presents no issue warranting review by this Court; it simply seeks reexamination of a settled question of congressional power.

1. The minority enhancement policy[3] withstood equal protection challenge in *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601, 613-16 (D.C. Cir.), *cert. denied*, 419 U.S. 986 (1984), in light of this Court's decisions in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), defining the parameters of federal remedial authority. The petition's theory that the reasoning of *West Michigan*, found controlling below, can no longer support the policy, is premised upon subsequent

[3] While the petition also challenges the female enhancement policy, the court below specifically declined to rule on that matter (Pet. App. 10a n.5) and it is accordingly without premise in the record.

decisions of this Court in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), defining the parameters of state and municipal remedial authority.

The constraints relevant to state action have no bearing on the Commission's public interest mandate, which this "Court has characterized . . . as 'a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy,'" *F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582, 593 (1981) (quoting from *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940)). Moreover, the Congress has taken direct action since the *West Michigan* ruling to render this policy specifically and affirmatively its own, by adoption of the Continuing Resolution, *supra*, mandating reinstatement of prior policy. The Commission described its own action in reinstating that policy and reaffirming the Review Board's judgment in this case as an effort "to comply with the legislation" (Pet. App. 51a). Accordingly, even were the permissible scope of agency authority in this area narrower than that of the Congress which delegated such authority, the propriety of the direct congressional action at issue here would follow, *a fortiori*, from the determination in *West Michigan* that the same action was proper when taken by the Commission.

2. As the court below found (Pet. App. 11a-12a), *West Michigan* itself remains fully consistent with the cases upon which it relied and is unaffected by those which followed. Employment of racial criteria in congressional enactments is constitutionally permissible when 1), the legislative "*objectives* . . . are within the power of Congress" and 2), the "*means* for [their achievement]" are consistent with due process. *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980). Both tests are met here.

As this Court reminded in *F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) (quoting from *NBC v. United States*, 319 U.S. 190, 217 (1943)), "the goal of the

[Communications] Act is 'to secure the maximum benefits of radio to all the people of the United States,'" and the "Congress . . . granted the Commission broad discretion in determining how that goal could best be achieved." The minority enhancement policy was adopted because the Congress and the Commission deemed it essential to achievement of diversity to remedy the effects of "[t]he extreme underrepresentation of minorities in [broadcast] ownership, [which] has been exhaustively documented . . . ." *West Michigan, supra,* 735 F.2d 601, 603 n.5.[4] This Court has found the Commission's "policy of promoting the widest possible dissemination of information from diverse sources to be consistent

[4] In adopting the policy the Commission stated: "Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment." *Statement of Policy on Minority Ownership of Broadcasting Facilities,* 68 F.C.C.2d 979, 981 (1978).

In mandating reinstitution of the policy in 1987, the Congress cited the "important public policy goals" of "promoting diversity of ownership of broadcast properties," and noted its past support for such policies. S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987). In one such earlier pronouncement, discussing the minority preference included in the legislation authorizing Commission use of a licensing lottery, the conference report identified "[t]he underlying policy objective of these preferences" as "promot[ion of] the diversification of media ownership and consequent diversification of programming content." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 17 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 2261, 2284. The Report noted that diversifying the media by "promoting ownership by racial and ethnic minorities—groups that traditionally have been extremely underrepresented in [broadcast] ownership" was designed both to "broaden the nature and type of information and programming disseminated to the public" and "remed[y] the past economic disadvantage to minorities which has limited their [media] entry . . . ." *Id.,* at 2287-88.

tent with both the public-interest standard and the First Amendment." *F.C.C. v. WNCN Listeners Guild,* 450 U.S. 582, 594 (1981).

While the petition "questions whether the promotion of program diversity is a compelling governmental interest" (Pet. 16) akin to that identified by Justice Powell in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), there is but one diversity to which the First Amendment is devoted. Freedom of expression is not the exclusive preserve of students; the First Amendment is in its essence inclusive.

Indeed, *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967), relied upon in *Bakke* (138 U.S. at 312), described the value of academic freedom by reference to the very diversity formulation by which that component of the Commission's public interest mandate has traditionally been described, that of Learned Hand in *United States v. Associated Press,* 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *affirmed,* 326 U.S. 1 (1945). The newspaper industry, he writes,

> serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.

It is this "general interest" to which the minority enhancement policy is directly addressed, rather than any single component. The "national commitment to the safeguarding of [academic] freedoms" identified in *Bakke* (438 U.S. at 312) benefits some of us directly, the rest only by its training of our leaders (*Keyishian, supra,*

385 U.S. at 603); the diversity which it is the duty of the Commission to preserve benefits us all directly.

The means by which the Commission and the Congress have pursued this legitimate objective likewise meet the due process requirement of *Fullilove*, 448 U.S. at 473. The minority enhancement policy is "narrowly tailored" to meet its remedial objectives. *Id.*, at 480. First, the minority enhancement constitutes a single factor in a multi-factor comparative selection process as distinct from the "inflexible percentages solely based on race" disfavoured by the Court. *Id.*, at 473; *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 728-29 (1989). The minority enhancement serves as a bonus equal to other non-race based factors such as local residence, past broadcast experience and local civic participation. Moreover, all of these factors are potentially outcome determinative only if competing applicants are deemed equal with respect to such other more important factors as diversification and quantitative integration.

Second, the minority enhancement was adopted only after ten years of regulatory efforts to rectify the "acute underrepresentation" of minorities through such race neutral alternative means as mandating community needs ascertainment, responsive program service and nondiscriminatory employment practices. *Minority Policy Statement, supra*, 68 F.C.C.2d 979-980 (1978); see *Croson, supra*, at 728. Despite favourable industry response to these measures, the Commission was "compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media," rendering "additional measures...necessary and appropriate.... [O]wnership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming," which "avoids direct government intrusion into programming decisions." *Id.*, at 980-81.

And third, the potential for misapplications of the program (*Fullilove, supra*, at 487-88) is slight. The Commission awards minority enhancements only after a full evidentiary hearing which includes opportunity for prehearing discovery and cross examination of witnesses prior to the issuance of an initial decision by an administrative law judge.

3. Finally, the suggestion that an intra-circuit conflict between panels of the District of Columbia Circuit requires review by this Court is without merit. Even if such a conflict existed, it would constitute no "special and important reason" for grant of certiorari under Rule 17 of this Court. The appropriate course in such a situation is a petition for rehearing and suggestion for rehearing en banc, which necessarily involves the full court. Such a petition, reciting the claim of conflict, was here filed and denied.[5] It is accordingly clear that the deciding court as a whole is satisfied that its actions are consistent.

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[5] A petition for rehearing and suggestion for rehearing en banc was also denied in the assertedly conflicting case, *Shurberg Broadcasting of Hartford, Inc. v. F.C.C.*, 876 F.2d 902 (D.C. Cir. 1989), *rehearing denied*, 876 F.2d 958, *petition for cert. filed sub nom. Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, No. 89-700 (Oct. 31, 1989), which held unconstitutional the Commission's minority distress sale policy permitting a licensee whose qualifications are in issue to sell its station prior to hearing at a below market price to a buyer with at least 20% minority ownership. In that case MacKinnon, J. filed an opinion in connection with his vote to deny rehearing and rehearing en banc (876 F.2d 954), in which he noted (876 F.2d at 956 n.2) that the instant case is distinguishable from *Shurberg* "on two material grounds. [*Metro*] involved (1) a comparative hearing and (2) the minority preference was only a *plus factor*. In *Shurberg* minority preference is an *absolute preference*. This case is not to be contrasted with a case which involved race as only one factor in a comparative licensing procedure."

In any event, the gravamen of the petitioner's assertion of conflict appears to be that if any race conscious action by the Commission may be found constitutionally infirm, then all must. That proposition is not only at odds with decades of appellate jurisprudence but also in conflict with this Court's observation that the Commission's equal employment opportunity rules "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act ... to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. F.P.C.*, 425 U.S. 662, 670 n.7 (1976) (dicta).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Margot Polivy
Katrina Renouf

RENOUF & POLIVY
1532 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 265-1807

Counsel for Respondent Rainbow Broadcasting Company

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